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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 DANIEL J. STEVENS,)

9 Plaintiff,)

10 v.)

11 MICHAEL J. ASTRUE, Commissioner of the)
Social Security Administration,)

12 Defendant.)

Case No. C09-702-JCC-BAT

**REPORT AND
RECOMMENDATION**

13 Plaintiff Daniel J. Stevens seeks judicial review of the denial of his application for disability
14 insurance benefits and supplemental security income benefits by the Commissioner of the Social
15 Security Administration, after a hearing before an administrative law judge (“ALJ”). Dkt. 1. This
16 matter has been referred to the undersigned Magistrate Judge pursuant to Local Rule MJR 4(A)(4)
17 and as authorized by *Matthews v. Weber*, 423 U.S. 261 (1976). Dkt. 10. Stevens contends that the
18 ALJ erred in assessing Stevens’s residual functional capacity and in finding that Stevens could
19 perform work that exists in significant numbers in the national economy. For the reasons below,
20 the Court recommends that the Commissioner’s decision be REVERSED and REMANDED for
21 further proceedings.

22 **I. FACTUAL AND PROCEDURAL HISTORY**

23 Stevens, who was born in 1955, was 47 years old on the alleged onset date and 53 years old

1 when the ALJ issued his decision. Tr. 54. He has a high school education and past work
2 experience as a plumber. Tr. 57, 65.

3 In July 2005, Stevens applied for disability insurance benefits and supplemental security
4 income alleging disability as of September 20, 2002. Tr. 57-59, 566-69. His application was
5 denied. Tr. 48, 570. He reapplied for disability insurance benefits and supplemental security
6 income in April 2006, again alleging disability as of September 20, 2002. Tr. 54-56, 571-73. His
7 second application was denied initially and on reconsideration. Tr. 41-42, 44-47, 574-77. The ALJ
8 held a hearing on September 22, 2008, and issued a decision on October 28, 2008 finding Stevens
9 not disabled. Tr. 16. On March 25, 2009, the Appeals Council denied Stevens's request for review,
10 making the ALJ's decision the Commissioner's final decision. Tr. 6-8. Stevens now seeks judicial
11 review of the Commissioner's final decision.

12 II. THE ALJ's DECISION

13 The ALJ applied the five-step sequential evaluation process for determining whether a
14 claimant is disabled. See 20 C.F.R. §§ 404.1520, 416.920. At step one, the ALJ found that Stevens
15 met the insured status requirements of the Social Security Act through June 30, 2007 and that he
16 had not engaged in substantial gainful activity since September 20, 2002. Tr. 18.

17 At step two, the ALJ found that Stevens had the severe impairment of degenerative disc
18 disease. *Id.*

19 At step three, the ALJ found that Stevens did not have an impairment that met or equaled
20 one of the listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1. Tr. 19.

21 The ALJ next found that Stevens had the residual functional capacity:

22 to lift and/or carry up to 20 pounds occasionally and 10 pounds
23 frequently, stand and/or walk up to six hours in an eight hour
workday, and sit up to six hours in an eight hour workday. The
claimant can frequently climb ramps and stairs, stoop, kneel, and

1 crawl, and he can occasionally climb ladders, ropes, and scaffolds.
2 The claimant should avoid concentrated exposure to hazards such
as machinery or heights.

3 *Id.*

4 At step four, the ALJ found that Stevens was unable to perform any past relevant work. Tr.
5 22.

6 At step five, the ALJ found that, considering Stevens's age, education, work experience, and
7 residual functional capacity, there are jobs that exist in significant numbers in the national economy
8 that he can perform. *Id.* The ALJ accordingly found that Stevens was not disabled from September
9 20, 2002 through the date of the decision. Tr. 23.

10 **II. STANDARD OF REVIEW**

11 This Court may set aside the Commissioner's denial of disability benefits when the ALJ's
12 findings are based on legal error or not supported by substantial evidence. 42 U.S.C. § 405(g);
13 *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th Cir. 2005). The ALJ determines credibility and
14 resolves conflicts and ambiguities in the evidence. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
15 Cir. 1995). The Court may neither reweigh the evidence nor substitute its judgment for that of the
16 Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is
17 susceptible to more than one rational interpretation, it is the Commissioner's conclusion that must
18 be upheld. *Id.*

19 **III. DISCUSSION**

20 **A. The ALJ's residual functional capacity finding**

21 Stevens argues that the ALJ's residual functional capacity finding does not reflect the ALJ's
22 actual assessment of Stevens's residual functional capacity. Stevens points to the opinion of his
23 treating physician, Thomas Williamson-Kirkland, M.D., that Stevens would be able to perform light

1 work, with certain postural limitations, and as long as he could “stand up, sit down, change
2 positions, and have a reasonable chair.” Tr. 183. The ALJ gave this opinion significant weight in
3 assessing Stevens’s residual functional capacity. Tr. 21. But the residual functional capacity
4 finding does not address the need for a sit/stand option. Tr. 19. The Court agrees that this omission
5 leaves the ALJ’s residual functional capacity finding unsupported by substantial evidence.

6 Plaintiff insists that this omission is merely a “scrivener’s mistake” and that the ALJ’s true
7 determination of this issue is located in his discussion of Dr. Williamson-Kirkland’s opinion, where
8 the ALJ found that Stevens requires an at-will sit/stand option. Dkt. 12 at 7. However, in
9 evaluating Stevens’s residual functional capacity, the ALJ also considered the opinions of
10 examining physician David Zucker, M.D., treating physician Ronald Waltz, M.D., and the non-
11 examining state agency physician, as well as lay opinion evidence. Tr. 20-22. The ALJ gave Dr.
12 Williamson-Kirkland’s opinion significant weight, but he did not adopt the opinion outright. He
13 also gave substantial weight to Dr. Zucker’s opinion, some weight to the state agency physician’s
14 opinion, and little weight to Dr. Waltz’s opinion and the lay witness evidence. Not all of these
15 sources opined that Stevens needed an at-will sit/stand option. In addition, the ALJ found that
16 Stevens’s statements about the intensity, persistence, and limiting effects of his symptoms were not
17 fully credible. Tr. 20.

18 As Stevens himself points out, where the claimant needs to alternate sitting and standing, the
19 residual functional capacity assessment “must be specific as to the frequency of the individual’s
20 need to alternate sitting and standing.” Social Security Ruling 96-9p.¹ But the ALJ failed to make

21 ¹ Social Security Rulings do not have the force of law. Nevertheless, they “constitute Social
22 Security Administration (SSA) interpretations of the statute it administers and of its own
23 regulations,” and are binding on all SSA adjudicators. 20 C.F.R. § 402.35(b); *Holohan v.*
Massanari, 246 F.3d 1195, 1203 n.1 (9th Cir. 2001). Accordingly, such rulings are given
deference by the courts “unless they are plainly erroneous or inconsistent with the Act or

1 this specific finding. 42 U.S.C. § 405(b) directs the Commissioner to make findings of fact. If a
2 district court rejects an ALJ's finding because it is not supported by substantial evidence, 42 U.S.C.
3 § 405(g) authorizes the district court to remand the case for rehearing before the agency. It does not
4 authorize the court to make its own findings of fact. This section, which governs this Court's
5 jurisdiction and the applicable standard of review, "makes no provision for a district court to make
6 any findings of its own." *Grant v. Shalala*, 989 F.2d 1332, 1338 (3rd Cir. 1993).

7 The Court declines to presume that the ALJ intended to find that Stevens needs to alternate
8 sitting and standing at will. Because the ALJ's residual functional capacity finding is not supported
9 by substantial evidence and, and because this is an outstanding issue that must be resolved before
10 determination of disability can be made, remand for further consideration by the ALJ is appropriate.
11 *See Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004). On remand, the ALJ should make a
12 specific finding as to the frequency of Stevens's need to alternate sitting and standing in
13 determining his residual functional capacity.

14 **B. Vocational expert testimony**

15 The hypothetical question the ALJ posed to the vocational expert did not include the need to
16 alternate sitting and standing. Tr. 611-12. For this reason, the vocational expert's testimony did not
17 provide substantial evidence to support the ALJ's finding that Stevens could perform other work in
18 the national economy. *See Tackett v. Apfel*, 180 F.3d 1094, 1101 (9th Cir. 1999) (hypothetical
19 questions posed to vocational experts must set out all of a claimant's impairments). The
20 Commissioner concedes that there was insufficient evidence to support a finding that two of the
21 jobs identified by the vocational expert, messenger and night patroller, allowed the opportunity to
22 alternate sitting and standing. Dkt. 16 at 8, n.1. But the Commissioner argues that the vocational

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regulations." *Han v. Bowen*, 882 F.2d 1453, 1457 (9th Cir. 1989).

1 expert's testimony was sufficient evidence to support a finding that Stevens can do the job of
2 photocopy machine operator. The vocational expert testified: "I believe this would allow for
3 movement with the machine, could probably sit down while it's operating, could stand up, walk
4 around." Tr. 614. This general statement, however, does not cure the ALJ's failure to specify the
5 frequency of Stevens's need to alternate standing and sitting. On remand, the ALJ should again
6 obtain testimony from a vocational expert, and, in posing a hypothetical question to the expert,
7 should specify the frequency of Stevens's need to alternate standing and sitting.

8 Stevens also argues that the vocational expert's testimony conflicted with the Dictionary of
9 Occupational Titles ("DOT")² and the ALJ failed to obtain a reasonable explanation for the conflict.
10 Under SSR 00-4p, an ALJ has an affirmative responsibility to inquire as to whether a vocational
11 expert's testimony is consistent with the DOT and, if there is a conflict, determine whether the
12 vocational expert's explanation for the conflict is reasonable. *See Massachi v. Astrue*, 486 F.3d
13 1149, 1152-54 (9th Cir. 2007). SSR 00-4p also requires the ALJ to explain in the decision how he
14 or she resolved the conflict. An error in following the procedural requirements of SSR 00-4p may
15 be harmless if the vocational expert provided sufficient support for her conclusion so as to justify
16 any conflicts. *Massachi*, 486 F.3d at 1154 n.19.

17 Here, the vocational expert testified that the job of photocopy machine operator is light
18 work, which is consistent with the DOT's classification of the job at DOT No. 207.685-014. Tr.
19 614. The ALJ asked the vocational expert if her testimony was consistent with the DOT, and she
20 stated that it was. *Id.* The ALJ found that the vocational expert's testimony was consistent with the

21 ² The Social Security Administration has taken administrative notice of the DOT, published by
22 the Department of Labor, as a source of reliable job information for purposes of a step-five
23 analysis. 20 C.F.R. § 404.1566(d). The DOT raises a rebuttable presumption as to job
classification. *Johnson v. Shalala*, 60 F.3d 1428, 1435-36 (9th Cir. 1995). But an ALJ may also
use a vocational expert at step five. 20 C.F.R. § 404.1566(e).

1 information in the DOT. Tr. 23. The ALJ thus satisfied the requirements of SSR 00-4p.

2 Stevens takes issue with the vocational expert's additional testimony that she believed the
3 photocopy machine editor job "would allow for movement with the machine, could probably sit
4 down while it's operating, could stand up, walk around." Tr. 614. However, this is precisely the
5 type of testimony a vocational expert can provide. As SSR 00-4p provides, the DOT lists the
6 "maximum requirements of occupations as generally performed, not the range of requirements of a
7 particular job as it is performed in specific settings." A vocational expert can provide testimony
8 that matches the specific requirements of a designated occupation with the specific abilities and
9 limitations of the claimant. *Johnson v. Shalala*, 60 F.3d 1428, 1435 (9th Cir. 1995). On remand, if
10 the vocational expert provides such testimony, the ALJ should obtain a reasonable explanation from
11 the vocational expert for any departure from the DOT and explain in the decision how he resolved
12 any conflict.

13 **C. Lay witness evidence**

14 Stevens argues that the ALJ failed to properly assess the lay witness evidence of William
15 McTaggart. Lay testimony as to a claimant's symptoms is competent evidence that the ALJ must
16 take into account, unless the ALJ expressly determines to disregard such testimony and gives
17 reasons germane to each witness for doing so. *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001).
18 The ALJ's reasons for disregarding lay witness testimony must be specific. *See Stout v. Comm'r*,
19 454 F.3d 1050, 1054 (9th Cir. 2006).

20 Mr. McTaggart testified that Stevens was unable to golf or attend sporting events, that bike
21 riding relieved Stevens's back pain, that Stevens sits in the recliner when he visits McTaggart's
22 house and only gets up to stretch and move around, that Stevens has to supplement his pain
23 medication with Tylenol or aspirin or he cuts it in half to make it last longer, that Stevens cannot

1 ride comfortably in a car, and that Stevens was unable to help Mr. McTaggart remodel his house.
2 Tr. 606-09. The ALJ found that Mr. McTaggart's testimony supported Stevens's allegations, but
3 gave it little weight because it was based on Stevens's self reports and was not consistent with the
4 medical evidence. Tr. 22.

5 Stevens argues that the ALJ erred by requiring Mr. McTaggart's opinion to be supported by
6 medical evidence. *See Bruce v. Astrue*, 557 F.3d 1113, 1116 (9th Cir. 2009) (holding that ALJ
7 erred in discrediting lay witness testimony as not supported by medical evidence in the record). But
8 the ALJ in fact found that Mr. McTaggart's opinion was not consistent with the medical evidence.
9 An ALJ may properly discount lay witness evidence that is inconsistent with medical evidence.
10 *Lewis*, 236 F.3d at 511; *see also* 20 C.F.R. § 404.1529(c)(3) ("[A]ny symptom-related functional
11 limitations and restrictions which . . . other persons report, *which can reasonably be accepted as*
12 *consistent with the objective medical evidence* and other evidence, will be taken into account"
13 (emphasis added)). This was a proper reason to discount Mr. McTaggart's testimony.

14 Nevertheless, the Court finds that, although the ALJ stated a valid reason, he failed to
15 specify how Mr. McTaggart's opinion conflicted with the medical evidence. Mr. McTaggart
16 testified that Stevens would stand or shift positions every 5 to 10 minutes when sitting. This is
17 consistent with the medical evidence from Dr. Williamson-Kirkland. On remand, the ALJ should
18 reconsider the weight to give to Mr. McTaggart's testimony, giving specific reasons for discounting
19 it, if necessary.

20 Stevens also argues that, contrary to the ALJ's finding, Mr. McTaggart's testimony was
21 based largely on Mr. McTaggart's own observations of Mr. Stevens. But Mr. McTaggart testified
22 about the effects of bike riding on Stevens's pain and the effectiveness of Stevens's pain
23 medications. This testimony was based on Stevens's reports of his symptoms, not Mr. McTaggart's

1 observations of Stevens. This was a germane reason to give little weight to these portions of Mr.
2 McTaggart's testimony.

3 **D. Non-physician adjudicator**

4 Stevens argues that the ALJ erred by evaluating the opinion of a non-physician state-agency
5 adjudicator as that of an acceptable medical source.

6 In evaluating Stevens's residual functional capacity, the ALJ found that the "residual
7 functional capacity conclusions reached by the physicians employed by the State Disability
8 Determination Services also supported a finding of 'not disabled.'" Tr. 21. The ALJ stated that
9 they found that Stevens could perform light work with minimal postural and environmental
10 limitations. The ALJ gave these opinions some weight, noting that, although "these physicians
11 were non-examining," there were a number of other opinions that reached similar conclusions. Tr.
12 21-22. The ALJ cited to exhibits 3F and 16F in making this finding. Exhibit 3F is a residual
13 functional capacity assessment signed by a state-agency staff person who is not a physician or
14 psychologist and who, in certain cases, is tasked with making an initial determination as to whether
15 a claimant is disabled. Tr. 167; Dkt. 12 at 20, Dkt. 16 at 6. Exhibit 16F is a case analysis signed by
16 John Bonner, M.D., who concluded that the "previously proposed RFC's are appropriate." Tr. 517.

17 Acceptable medical sources include licensed physicians and psychologists. 20 C.F.R.
18 § 404.1513(a). Only opinions from acceptable medical sources can establish the existence of an
19 impairment. *Id.* But the ALJ may consider other-source opinions about the severity of a claimant's
20 impairments and how the impairments affect the claimant's ability to work. *Id.* § 404.1513(d).

21 Stevens argues that the ALJ made a harmful error when he evaluated the staff person's
22 opinion as though it were a physician's opinion. He cites to an Eighth Circuit case, which found
23 that an ALJ who made a similar mistake erred by crediting the non-physician's opinion and,

1 because the ALJ had given that opinion substantial weight and had refused to give controlling
2 weight to the claimant's treating physician, the error was harmful. *Dewey v. Astrue*, 509 F.3d 447,
3 449-50 (8th Cir. 2007).

4 The situation here is dissimilar from that case. Here, the ALJ gave only some weight to the
5 non-physician's opinion, while giving significant weight to Dr. Williamson-Kirkland's opinion. In
6 addition, the non-physician's opinion was later reaffirmed by a state-agency physician, and the ALJ
7 appropriately evaluated the state-agency physician's opinion as that of an acceptable medical
8 source. Finally, the non-physician's opinion here was largely consistent with Dr. Williamson-
9 Kirkland's opinion except as to the need to alternate sitting and standing. Although, on remand, the
10 ALJ should consider this opinion as that of a source other than an acceptable medical source, the
11 Court is convinced that the error was inconsequential to the ultimate nondisability conclusion and
12 was therefore harmless. *See Stout*, 454 F.3d at 1055.

13 V. CONCLUSION

14 For the foregoing reasons, the Court recommends that this case be REVERSED and
15 REMANDED for further proceedings. A proposed order accompanies this Report and
16 Recommendation.

17 DATED this 26th day January, 2010.

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21 BRIAN A. TSUCHIDA
22 United States Magistrate Judge
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